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Stephen Tierney: Constituting Scotland: a Retreat from Politics?

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The Scottish Government has [recently announced](#) its intention to introduce a draft Scottish Independence Bill into the Scottish Parliament which will set out an interim constitution for Scotland in the event of a Yes vote in September's referendum. It will also describe the process by which a permanent written constitution will be drafted following the Scottish Parliament elections in [2016](#). The announcement by Deputy First Minister Nicola Sturgeon that this latter process will be participative and collaborative is to be welcomed, as is the Government's commitment to the principle of the sovereignty of the people. In this article, however, I wish to challenge the modern inclination to embed more and more values beyond the reach of legislatures, arguing that popular sovereignty is best maintained by modest constitutional arrangements which leave as many policy choices as possible to elected parliaments.

As yet of course we don't know what the final constitution will contain, but if Scotland does become independent it will do so at a time when more and more countries are opting for ever more elaborate written constitutional documents. It seems that this fashion is likely to rub off on any constitutional convention established to draft a Scottish constitution.

The Scottish Government in its White Paper, [Scotland's Future](#) has already suggested that Scotland's constitutional structure is likely to be radically different from the current unwritten arrangement of the United Kingdom, entrenching issues as specific as a minimum standard of living, a ban on nuclear weapons and environmental protections. In this desire it is not alone; many constitutional activists at UK level would love such an opportunity to turn the UK constitution into a rigid structure of supposedly settled values, and who knows, Scottish independence may well provide that opportunity should the break up of the state prompt a moment of fundamental constitutional reconstruction also at UK level.

I should say immediately that my argument is not against a written constitution for Scotland per se. In the event of independence some form of foundational written document will be needed to replace the Scotland Acts of 1998 and 2012; even if an unwritten constitution were considered desirable, it is simply impossible today to replicate the conditions under which the UK Parliament acquired its authority. The powers of the Scottish Parliament and Scottish Government will require to be defined, as will the court structure, its hierarchy and the limits of its jurisdiction. A proposal to make provision for local government (proposed by the White Paper) would also fit within this model of a limited, institution-framing constitution; all of which would serve as a democracy-facilitating rather than a democracy-constraining set of provisions. But is it necessary to go beyond such a minimal constitutional model which would still leave policy choices to the new parliament? A new constitution will be needed, but it does not require to contain detailed policy issues which should rightfully remain the preserve of the elected parliament.

Notably the White Paper anticipates a document that will collate a very broad range of principles and detailed policies. For example:

- entitlement to public services and to a minimum standard of living;
- protection of the environment and the sustainable use of Scotland's natural resources;
- a ban on nuclear weapons being based in Scotland;
- rights in relation to healthcare, welfare and pensions;
- children's rights; and
- rights concerning other social and economic matters, such as the right to education and a Youth Guarantee on employment, education or training.

And this captures only a few of the policy preferences that will be put on the table during any drafting process. Certainly all of these issues will be for any constitutional convention drafting the constitution to determine, but the very fact that the White Paper considers such detailed policies to be appropriate for constitutional protection will serve to invite others to put forward their particular agendas and preferences, and these may well find their way into a new constitution, no matter how specific, contingent and deeply contested they may be.

I would like to sketch very briefly six key concerns with such a detailed model of constitutional codification:

- legitimacy
- judicial supremacy
- rigidity
- the stifling of political debate
- a marginalisation of the political power of citizens, and
- the creation of a constitutional battleground.

First, it seems highly questionable from the perspective of democratic legitimacy that the first generation of post-independence Scots should take upon themselves the power to crystallise a broad range of current predilections – some of which may well be fads - as constitutional principles. This will immediately constrain the decision-making capacity of successive generations of voters across a potentially vast array of policy issues.

Secondly, by constitutionalising specific values and policies, the constitution will significantly ramp up the powers of judges. The authority to resolve disagreements which are currently matters of political deliberation will be handed to a small unelected group which is arguably both unsuited and, in democratic terms, unentitled to determine these issues.

Thirdly, such a constitutional arrangement would bring a radical transformation to the constitutional culture of the country itself. Scots would be leaving what is arguably the most flexible constitutional system in the world and creating potentially one of the least flexible. It is fashionable (mainly among academics) to criticise the UK constitutional system precisely because of its unwritten form and the concomitant privilege given to the Westminster Parliament as sovereign law-maker. But this model has worked very well over several centuries, allowing the UK body politic to adapt itself smoothly to new developments: the creation and amendment of the devolution settlements for Scotland, Wales and Northern Ireland since 1998, and the conclusion of the Edinburgh Agreement paving the way for the independence referendum, being good examples. The principle underpinning parliamentary supremacy is a sound one: it is for Parliament, elected by the people, to debate and determine how law should manage competing political and moral values. If Parliament later changes its mind, this legislation is open to amendment or repeal by the same process. A written constitution replaces this with a form of rigidity which could lead to constitutional stasis. Furthermore, we also don't know how deeply entrenched the new Scottish constitution will be because the convention which will draft the constitution will no doubt also determine its amendment procedure. But there is now a tendency around the world to make certain constitutional provisions virtually unamendable. At the very least, any issue given constitutional protection in a new Scottish state will be very hard to shift; that after all is the point of constitutional entrenchment. One mechanism which does serve to keep the people involved in constitutional deliberation is the referendum. It will be interesting to see what role, if any, is intended for referendums in the process of constitutional amendment under any new arrangements.

Beyond this, there is a danger that a highly detailed constitution can serve to supplant, and in so doing foreclose, political debate. Later attempts to amend issues which have been accorded constitutional protection will not only be difficult in practical terms but could be burdened with the stigma of illegitimacy. A constitution is not, after all, merely a regulatory device. It sets out the values of the state (particularly when it is a new state), and in doing so can help to shape the public identity of citizens. Once something is entrenched in a constitution it can become reified as a moral principle that transcends transient policy choices; extolled as a metaphysical value, the merits of which are rendered unimpeachable and to which citizens are called upon to owe unswerving allegiance. To campaign to amend such principles can lead to charges of disloyalty to the constitution and the political system itself. Incidentally, another recent move is to suggest that all holders of public office must pledge allegiance to the constitution and to its provisions: this is a particularly pernicious innovation, presenting the constitution as modern day Test Act, transforming dissent into heresy. It is to be hoped that this form of intolerance will be disavowed in any move towards a constitution for Scotland.

This raises a fifth issue: why do so many issues need to be entrenched beyond the decision-making competence of ordinary citizens? If matters of wealth distribution, international responsibility and good environmental policy are the preference of a majority of right-thinking people, why not leave it to the Scottish Parliament to legislate in these areas? Is there a failure of trust in the capacity of the people and/or the Parliament of an independent Scotland to make the right decisions? The rush to elevate so many issues beyond the realm of the political would seem to demonstrate a lack of confidence in a new country. Should the first step after 'independence' really be a detailed circumscription of the areas over which the Scottish people can, from generation to generation, determine and re-determine their own policies, in order to 'protect' them from their own ignorance or poor judgment? If Scots are fit for self-government then surely they are big enough and old enough to build their future through the rough and tumble of the political process.

A final danger is that if a signal is sent that the constitution is intended to micro-manage political and moral values then the constitution-drafting process could well become a battle for the soul of the country. The birth of the state could lead to a culture war resulting in a sharp delineation between victors and losers, and in turn leaving a large number of people feeling excluded from an elaborate, highly specific and deeply partial vision of national identity solidified in the constitution. Such a dispute could be just as acute, or indeed more acute, than the referendum campaign itself. It is not hard to imagine that certain pressure groups will be glad for the opportunity to see their own value preferences privileged within a constitution, placing these beyond the opposition of a simple majority of the people or their elected representatives. This, as I say, is a parlous game and a potentially undemocratic (as well as an entirely avoidable) one. It risks the drafting process being heavily influenced by the most vocal and best organised interest groups, including those which cast their opponents not only as wrong but as bad, thereby inhibiting debate and claiming that political victories which they manage to achieve are thereafter morally unquestionable and immune from any residual dissensus. By this construction it is not in reality the founding generation that gets to play for keeps, but rather activist elites within this generation which may well be both unelected and unrepresentative.

What then of the proposed process by which such a detailed constitution will come about? Until the Scottish Independence Bill is published we must rely upon the White Paper which suggests that a constitutional convention will 'prepare the written constitution' following the elections to the Scottish Parliament of May 2016 (some six weeks after Independence Day, set for 24 March). As yet we don't know much about the proposed convention other than that it is intended to be 'open, participative and inclusive' and that the new constitution 'should

be designed by the people of Scotland, for the people of Scotland'. Given the potential that a highly detailed document will emerge from this convention, the composition of this body, who decides on its composition, how it deliberates and how it reaches decisions will each be a vital, and potentially deeply contentious, issue. We should watch keenly to see how the Scottish Independence Bill approaches these issues.

Independent statehood will itself be a massive step. Citizens will have to reorient their focus away from Scotland's relationship with the UK political system, addressing one another in all their diversity as co-authors of a new polity. It should be a time for modesty and moderation, to take stock and consider the future carefully, to respect other views, to accommodate the deep differences that have always marked Scottish society but which have not been fully vocalised during a period in which attention was diverted from internal identities towards external influence. It will also be a time to heal divisions that may still be sensitive following the referendum campaign. I would counsel against rushing into an expansive process of constitution-building. Once the essential organs of government have been established, why not leave the democratic will of the people, expressed through their Parliament, to shape policy for the new state? It seems strange that the newly won autonomy of an independent people should be immediately truncated by the deep entrenchment of a highly partial set of policy preferences. The September referendum in itself encapsulates the spirit of vernacular politics – letting the people decide. If independence comes about, why would we abandon this inheritance?

Stephen Tierney is Professor of Constitutional Theory at the University of Edinburgh. This post first appeared in [Discover Society](#).

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